

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**STATE EX REL DEWEY &
LEBOEUF, LLP**

RELATOR,

**v.
HONORABLE KEVIN CRANE,
BOONE COUNTY CIRCUIT JUDGE**

RESPONDENT.

DOCKET NUMBER WD73151
DATE: December 28, 2010

Appeal From:

Boone County Circuit Court
The Honorable Kevin M. J. Crane, Judge

Appellate Judges:

Writ Division: Cynthia L. Martin, Presiding Judge, James M. Smart, Jr. and James E. Welsh,
Judges

Attorneys:

Dale C. Doerhoff, Jefferson City, MO, for relator.

Anthony R. Behr, Clayton, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

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LEBOEUF, LLP,**

RELATOR,

v.

**HONORABLE KEVIN CRANE,
BOONE COUNTY CIRCUIT COURT JUDGE,**

RESPONDENT.

No. WD73151

Boone County

Before Writ Division: Cynthia L. Martin, Presiding Judge, James M. Smart, Jr. and James E. Welsh, Judges

Original proceeding in prohibition and mandamus. Relator Dewey & LeBoeuf, LLP seeks to prohibit the Respondent, the Honorable Kevin Crane, Circuit Court of Boone County, Missouri, from requiring the return of all copies of an August 30, 1999 letter prepared by Sidley & Austin, a law firm retained to provide representation to the Department of Insurance, Financial Institutions & Professional Registration and/or to the Director of the Department. Dewey & LeBoeuf also seeks a writ of mandamus requiring Respondent to order the production of other Sidley & Austin documents. Dewey & LeBoeuf claims the letter and the other Sidley & Austin documents are "at issue" by virtue of a malpractice action filed against it by the Director in his capacity as Receiver in connection with liquidation proceedings involving General American Mutual Holding Company.

The Department opposed Dewey & LeBoeuf's efforts to compel production of the Sidley & Austin documents, and was the movant on the motion requesting return of all copies of the August 30, 1999 Sidley & Austin letter. The Department claims it has an attorney/client privilege with Sidley & Austin that it has not waived and that could not be waived on its behalf by the Director, whether acting as the chief officer of the Department or as the Receiver for General American.

The Respondent agreed with the Department and entered two Orders dated November 1, 2010, requiring Dewey & LeBoeuf to return all copies of the August 30, 1999 Sidley & Austin letter, and denying Dewey & LeBoeuf's motion to compel production of other Sidley & Austin documents. The Respondent did not expressly address whether the contested documents are "at issue" but, instead, based his Orders on a conclusion that the attorney/client privileged attached to the documents belonged to the Department and that the Director could not waive the Department's privilege.

**PEREMPTORY WRITS OF PROHIBITION AND MANDAMUS ISSUED;
REMANDED.**

Writ Division holds:

(1) The Department of Insurance is a legal entity that enjoys the protection of the attorney/client privilege. However, the Department, like a corporation, and as an inanimate entity, cannot speak directly to its lawyers and, thus, can neither create nor waive an attorney/client privilege except by the actions of individuals empowered to act on its behalf.

(2) The Director of Insurance is statutorily designated as the chief officer of the Department and has the duty to perform all duties imposed upon him by the laws regulating the business of insurance in Missouri.

(3) The Director, or those operating under the Director's instruction, have the authority, therefore, to create and to waive an attorney/client privilege on the Department's behalf so long as acting consistent with the Director's duties as described by the laws regulating the business of insurance in Missouri.

(4) Sections 375.1150 to 375.1246 (the Missouri Insurer's Supervision, Rehabilitation, and Liquidation Act) are a part of the laws regulating the business of insurance in Missouri. The Act empowers the Director to take charge of distressed domestic insurance companies and as a tool in that process, to secure appointment as a Receiver for a distressed domestic insurance company.

(5) The Director, or those acting at the Director's instruction (including general counsel to the Department), engaged Sidley & Austin to represent the Department and the Director as Receiver in connection with proceedings under the Act involving General American. In so doing, the Director, or those acting at the Director's instruction, were performing duties imposed upon the Director by the laws regulating the business of insurance in Missouri and were thus authorized to waive the Department's attorney/client privilege in connection with said proceedings.

(6) To the extent the Director, either as chief officer or as Receiver, received legal advice about enforcement of the Act as to General American, the Director received that advice in connection with enforcing the laws regulating the business of insurance in Missouri and thus on the Department's behalf. If that legal advice has been placed "at issue" in litigation filed by the Director (whether or not in the Director's capacity as Receiver), then the attorney/client privilege associated with that advice has been waived.

(7) Alternatively, even if the Director as Receiver were to be treated as a distinct entity from the Department and/or from the Director as chief officer (as argued by the Department), documents generated by virtue of Sidley & Austin's direct representation of the Director as Receiver would not create an attorney/client privilege in favor of the Department. Under this alternative, any attorney/client privilege would belong to the Director as Receiver and has been waived by the Director as Receiver if placed "at issue" by the malpractice litigation.

Opinion by: Cynthia L. Martin, Judge

December 28, 2010

This summary is UNOFFICIAL and should not be quoted or cited.
